PP

v.

SAHARI USUL & ORS

HIGH COURT MALAYA, SHAH ALAM
BADARIAH SAHAMID J
[CRIMINAL TRIAL NO: 46-1-2006]
5 OCTOBER 2011

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Common intention - Accused persons jointly charged with murder of a foreigner - Whether there was common intention to commit offence - Totality of evidence adduced - Consideration of - Whether accused acted in self defence - Whether reasonable doubts raised in prosecution's case*

The three accused here ('accused') were police officers and were jointly charged, in furtherance of a common intention, with the murder of an Indonesian ('the deceased') who was alleged to have an affair with a civilian's ('SP20') wife. SP20 lodged a police report stating that the deceased had sent his wife a short message service (SMS) note threatening to entice her away from SP20 and kill, among others, members of SP20's family if the deceased was harmed. After SP20 related this incident to the first accused, the latter together with the second and third accused, brought the deceased to the police station. The first accused then informed SP20 and the deceased's former employer ('SP33') to be present at the police station where they were allowed to beat up the deceased, with the presence of the three accused. Thereafter, SP20 returned home from the police station whereas the second and third accused took the deceased to SP33's car. The first accused did not follow them but had handed over his revolver to the third accused upon the latter's request. SP33 was then instructed by the second and third accused to drive them and the deceased to an open space estate. The deceased, who was handcuffed, was led out of the car, ordered to kneel on the ground and was shot in his head from behind by the third accused. He also fired two more bullets into the deceased's head after he fell. The second and third accused later informed SP20 that the deed had been done and replaced the spent bullets into the revolver before returning it back to the first accused. SP20 and SP33 were arrested and charged with the deceased's murder but

when their charges were reduced to the offence of voluntarily causing hurt under s. 323 of the Penal Code, both pleaded guilty and were sentenced to seven months' imprisonment. At the end of the prosecution's case, all three accused were called upon to make their defence. The third accused admitted shooting the deceased but alleged that the shots were fired in self defence during a scuffle he had with the deceased.

Held (acquitting and discharging the first accused, convicting the second and third accused for murder and sentencing them to death):

(1) The synchronised, mutually supporting roles played by the second and third accused, from the time the deceased was brought to the station to the time the fatal shots were fired, led to the irresistible inference that the shooting of the deceased was not done in self-defence but was the execution of a deliberate plan by the second and third accused. (para 105)

(2) On the totality of the evidence adduced, including the defence raised by the first accused, there were reasonable doubts that the first accused had a common intention with the second and third accused to murder the deceased. (para 86)

(3) The second and third accused did not act as police officers but as 'partners' in the heinous crime committed by: (i) arresting the deceased without proper evidence and procedure, (ii) detaining the deceased and encouraging civilians to injure him in the premises of the police station, (iii) bringing the deceased to the estate to execute their plan, (iv) meeting up with SP20 to report that the deed had been done and (v) actively concealing the evidence of their deed. (para 106)

(4) The consensus *'ad idem'* reached by the second and third accused could have been anytime between the deceased's arrest to the fatal shots fired by the third accused. The conduct of both the second and third accused throughout was totally consistent with such consensus. (para 107)

(5) On the totality of the evidence adduced, including the defence of the second and third accused, there was ample cogent and credible evidence to demonstrate that the second and third

accused had the common intention and was acting in concert to commit murder. The defence offered by the second and third accused had failed to rebut or to raise reasonable doubts on the prosecution's case. (para 108)

Case(s) referred to:
Angsa Anak Garak v. PP [2010] 3 CLJ 529 CA ***(refd)***
Azlan Alias v. PP [2009] 1 LNS 534 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Krishna Rao Gurumurthi v. PP & Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 HC ***(refd)***
Pie Chin v. PP [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 HC ***(refd)***
PP v. Dato' Balwant Singh (No 2) [2003] 7 CLJ 285 HC ***(refd)***
PP v. Dato' Mokhtar Hashim & Ors [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 HC ***(refd)***
PP v. Dato Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Ngoi Ming Sean [1981] CLJ 93; [1981] CLJ (Rep) 251 HC ***(refd)***
Tan Buck Tee v. PP [1961] 1 LNS 130 HC ***(refd)***
Tan Kim Lue v. PP [1970] 1 LNS 155 HC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180
Evidence Act 1950, s. 138(3)
Penal Code, ss. 34, 96, 99, 300, 302, 323

For the prosecution - Muhd Azari Harun (Muhammad Mustapha P Kunyalam with him) DPPs
For the 1st accused - J Kuldeep; M/s Kuldeep & Co
For the 2nd accused - Athimulan; M/s Athimulan & Co
For the 3rd accused - G Ravishankar; M/s G Ravishankar & Co

Reported by Ashok Kumar

JUDGMENT

Badariah Sahamid J:

Charge

[1] The three accused abovementioned were charged under s. 302 to be read with s. 34 of the Penal Code for the offence of murder. The charge against all three accused reads as follows:

A Bahawa kamu bersama-sama pada 13 Januari 2006, antara jam 10.00 malam hingga 11.30 malam, di Ladang Caledonia KM22, Jalan Kuala Lumpur, Kuala Selangor, Batu Arang, di dalam daerah Gombak dalam negeri Selangor Darul Ehsan, bagi tujuan mencapai niat bersama kamu, telah melakukan kesalahan membunuh, iaitu
B menyebabkan kematian ke atas YUSRIZAL BIN YUSUF (WARGANEGARA Indonesia Pasport No: M556433) dan dengan itu, kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

C **[2]** At the trial, 35 prosecution witnesses were called to give evidence in court. At the end of the prosecution case, in the light of a maximum evaluation of the totality of evidence adduced in accordance with s. 180 of the Criminal Procedure Code and guidelines laid down by authorities like *Looi Kow Chai & Anor v.*
D *PP* [2003] 1 CLJ 734; *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; *PP v. Dato Seri Anwar Ibrahim* [1999] 2 CLJ 215 and *Balachandran v. PP* [2005] 1 CLJ 85, I was satisfied that the prosecution had proven a *prima facie* case that all three accused had the common intention to murder the deceased and had acted
E in furtherance of the common intention. I therefore ordered all three accused to enter their defence.

[3] At the end of the defence I ordered the first accused, Sahari bin Usul to be acquitted and discharged as there were
F reasonable doubts raised by his defence. However, I found the defence of the second and third accused had not rebutted or raised reasonable doubts on the prosecution case, and convicted the second and third accused of the offence charged and passed the sentence of the death penalty.

G **[4]** The public prosecutor has appealed against my decision to acquit and discharge the first accused. The second and third accused has appealed against their conviction. I set out below my findings and grounds of judgment in respect of all three accused.

H **Background Facts**

[5] The following narration of the background facts is derived substantially from prosecution witnesses.

[6] SP20 had been informed by SP17 that the deceased had
I been conducting an affair with his wife, SP28 since May/June of 2005. The deceased had been seen together with SP28 in her car

and SP20 had also seen photographs of the deceased with SP28. SP28 herself in her evidence had testified "kenal sangat rapat dan kadang-kadang keluar" with the deceased.

[7] According to SP20, the deceased through an sms (short message service) to SP28, had threatened to entice SP28 from SP20 and to kill SP20's family as well as seven generations of SP20 if the deceased was harmed. ("kalau abang pukul saya, pukul sampai mati, kalau saya tak mati saya akan bunuh semua anak-beranak abang dan tujuh keturunan").

[8] SP20 then lodged a police report at Balai Polis Kuang. Subsequently, SP20 who happened to meet the first accused at SP10's house had raised the matter with the first accused. SP20 was advised to lodge a police report at Sg Pelong Police Station and to leave the matter in the hands of the police. SP10 at the request of SP20 then gave SP20 the first accused's handphone number.

[9] On 13 January 2006 at about 7pm, SP20 received a telephone call from the first accused requesting SP20 to come to the police station at Sg Pelong to give a copy of a police report that he had made earlier at Kuang Police Station, and for the purpose of identification of the deceased who had been brought to the police station in Sg Pelong. SP33 the deceased's former employer was also informed by the first accused by telephone that the deceased had been arrested. It is not clear from the evidence why SP33's presence was required.

[10] SP20 and SP33 responded to the calls and went to the police station, arriving separately at sometime between 8pm to 8.15pm. Both SP20 and SP33 were brought into the meeting room at the police station by the first accused. According to SP20, the second accused had informed SP20, "masuk dan lepaskan geram, tapi jangan sampai teruk". ('You can enter and vent your anger, but do not go overboard') SP20 and SP33 entered the meeting room where the deceased was handcuffed with his hands behind his back. Both SP20 and SP33 kicked and punched the deceased which caused the deceased to suffer injuries and bleed. All this occurred in the meeting room of the police station at Sg Pelong in the presence of the first, second and third accused.

[11] The evidence of SP32's forensic analysis was that blood stains of the deceased were found on the wall, the notice board and the carpet in the meeting room of the police station.

[12] SP20 had testified that subsequently he saw the second accused come out of the meeting room carrying a plastic bag in which were contained a 'tangkal' (talisman) which the deceased had worn round his waist, a bottle, believed to contain 'minyak pengasih' (love potion), belonging to the deceased and a Maybank ATM card belonging to SP28 and the deceased's handphone. All the above mentioned items had been recovered from the accused in the meeting room. All the above mentioned items except for the ATM card and the handphone were flushed down the toilet at the police station. SP2O testified receiving the deceased's handphone from the second accused. SP20 then sold 'the deceased's handphone to SP33 but retained its sim card. SP20 left the police station for home at about 9pm. At that time the first, second, third accused, SP33 and SP11 (a staff at Enquiry) were still at the police station.

[13] The second and third accused then brought the deceased, who was still handcuffed, out of the station and into SP33's car – a Proton Satria Registration No. BCY 6920. The second and third accused then invited the first accused to join them, but the first accused declined on the grounds that his wife was pregnant. The first accused then took out his revolver and gave it to the third accused.

[14] SP33 was instructed by the second accused to drive. The third accused was seated next to SP33 in the front seat. The deceased was in the back seat, still handcuffed, seated next to the second accused. In the course of the journey, the third accused instructed SP33 to turn right to an open space-Ladang Caledonia. On arrival, SP33 stopped the car on the third accused's instructions and the second and third accused got out of the car leaving SP33 with the deceased inside the car. According to SP33 he saw the second and third accused in discussion but he could not make out what was said. SP33 was then instructed to take the deceased out of the car.

[15] The deceased who was handcuffed was ordered to kneel on the ground near where the car was parked. SP33 testified he then saw the third accused take out his gun and from behind,

shoot the deceased in the head at close range. SP33 heard the deceased cry out before he fell to the ground. The third accused shot the deceased a further two times in the head from behind. The third accused then relieved the deceased of his handcuffs. According to SP33 at the time the shots were fired by the third accused, the second accused was in front of the deceased.

[16] Thereafter, SP33, the second and third accused entered the car and left the scene. The second accused then instructed SP33 to call SP20 to ask SP20 to bring with him the deceased's telephone sim card and to meet them at Restoran Maju Aman the same night. SP20 had testified that at the subsequent meeting at the said restaurant, SP20 was asked to surrender the deceased's sim card. The second accused had showed SP20 three spent bullets and said, "dah padamlah" ('has extinguished'). This meeting was corroborated by SP34 who testified having seen SP33, SP20, the second and third accused at the abovementioned restaurant on 13 January 2006 at about 10-11pm.The first accused was not present at this meeting.

[17] The deceased was found the next day on 14 January 2006, sprawled face upwards on the grounds of Ladang Caledonia. A post mortem report by SP30 who had examined the deceased on 15 January 2006 found that the deceased had sustained bruises and injuries to his face, lip, right leg and chest as a consequence of being kicked, punched and or beaten with a blunt object. In addition, there were three gunshot wounds in the deceased's head. SP33 testified categorically that the cause of death was the gun shots in the deceased's head.

[18] SP20 and SP33 were subsequently arrested and charged with the murder of the deceased. However, the charges were reduced to voluntarily causing hurt under s. 323 of the Penal Code. Both SP20 and SP33 pleaded guilty and were imprisoned for seven months.

Evaluation Of Prosecution Case

Prima Facie Case Established

[19] At the end of the prosecution case it is incumbent on this court to determine whether on a maximum evaluation of the totality of the evidence adduced, the prosecution has established a *prima facie* case in accordance with s. 180 of the Criminal

Procedure Code and guidelines laid down by authorities like *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; *PP v. Dato Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215 and *Balachandran v. PP* [2005] 1 CLJ 85, in which the Federal Court stated thus:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The result is that the force of the evidence adduced must be such that if unrebutted, it is sufficient to induce the court to believe in the existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen.

Section 300 Of The Penal Code

[20] To prove the offence of murder, the prosecution evidence must prove one of the four limbs of the section. Section 300 states as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[21] To summarise, the elements the prosecution must prove are thus:

1. The death of the deceased;

2. The death of the deceased was caused by the injuries sustained by the deceased;

3. The injuries were inflicted by the three accused in furtherance of a common intention;

4. The three accused had inflicted the injuries with the requisite *mens rea* laid out in one of the four limbs of s. 300 abovementioned.

Death Of Deceased And Cause Of Death

[22] On careful evaluation of the prosecution evidence, I am satisfied that the prosecution has proved the first two elements abovementioned. A post mortem report by SP30 confirmed the death of the deceased was caused by three gunshot wounds in the head.

> Si mati mengalami 3 das tembakan dibahagian kepala, dua daripada tiga tembakan tidak menembusi kepala sepenuhnya dan ditemui dua butir anak peluru-satu butir lengkap dan satu butir dalam bentuk dua serpihan. Kecederaan calar lebam dan koyak dibahagian muka, dahi, pipi, bahu kiri dan betis kanan adalah kecederaan baru dan akibat blunt trauma-disebabkan sama ada dipukul dengan alat keras dan tumpul dan terhentak pada permukaan keras dan rata. Punca kematian-akibat luka tembakan di kepala.

[23] This was reiterated thus, "tiga das tembakan kepala yang menembus otak boleh sebabkan kematian segera/serta merta."

Mens Rea

[24] Established precedents have held that in order to establish *mens rea* the court has to look at the nature of the injuries caused to the deceased and the weapon used to inflict those injuries. The use of a lethal weapon like a gun as in this case, leads to the irresistible inference that the intention is to cause death

Angsa Anak Garak v. PP [2010] 3 CLJ 529; *Tan Buck Tee v. PP* [1961] 1 LNS 130; *Tan Kim Lue v. PP* [1970] 1 LNS 155.

[25] The fact that there were three gun shots in the deceased's head, which shots were fired at close range leaves this court in no doubt that the perpetrators had the *mens rea* to commit murder of the deceased.

Common Intention

[26] The next issue to consider is whether there was a common intention (consensus *'ad idem'*) for all three accused to commit murder.

[27] Section 34 of the Penal Code states that:

> Each of several persons liable for an act done by all, in like manner as if done by him alone.
>
> when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[28] Criminal liability under s. 34 of the Penal Code was explained by Justice Hashim Yeop Sani in *PP v. Dato' Mokhtar bin Hashim & Ors* [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 at p. 749 thus:

> Under section 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of the individual. In most cases however it can be inferred from his act or conduct or other relevant circumstances of the case.

[29] The above is further reinforced in the Federal Court case of *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 at p. 29 where Zulkifli Makinuddin FCJ said at p. 35:

> It is a well established principle of law in dealing with criminal liability under s. 34 of the Penal Code that a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case.

The above principle was reaffirmed in the case of *Krishna Rao Gurumurthi v. PP And Another Appeal* [2009] 2 CLJ 603.

[30] Was there a consensus *ad idem* between the first, second and third accused? Learned defence counsel for the first accused contends the absence of the participation of the first accused in the common intention to murder the deceased. The roles of the

second and third accused in the commission of the offence are clear from the evidence. The third accused had fired the shots in the presence of the second accused. The first accused was not present at the material time the murder was committed but when the second and third accused were leaving the police station, it was the first accused who had handed his gun to the third accused.

[31] From the evidence adduced it is my considered opinion that the plan to murder the deceased was hatched at the police station in Sg Pelong. Even though the first accused was not physically present when the fatal shots were fired, sometime before leaving the police station there was a consensus *'ad idem'* between the first, second and third accused to murder the deceased. The roles played by the first, second and third accused is supportive of the existence of a common intention between them.

[32] It was the first accused who had requested SP20 and SP33 to come to the police station on 13 January 2006. SP11 had testified seeing the first, second and third accused going in and out of the meeting room where the deceased, who was handcuffed was kicked and punched by SP20 and SP33. Both SP20 and SP33 testified beating up the deceased in the presence of the first, second and third accused. Although the first accused had declined to accompany the second and third accused on the grounds his wife was pregnant, the first accused nevertheless handed over his gun to the third accused. From the above circumstances, the irresistible inference is that there was a 'meeting of the minds' of the first, second and third accused and all three accused had acted in furtherance of a common intention to murder the deceased.

[33] According to SP33 who was the driver, during the journey to Ladang Caledonia, there was no question or discussion between the second or the third accused as to the destination or purpose of the trip. From this, I can only surmise that the plan to murder the accused preceded driving the accused to Ladang Caledonia. From the time the deceased was brought into SP33's car at around 9pm to Ladang Caledonia where the deceased was shot, to the meeting at Maju Aman Restaurant at around 11pm it had taken only about two hours, suggestive of an efficient execution of a pre-arranged plan.

[34] I have no doubt that the roles played by the first, second and third accused were in furtherance of a common intention. The circumstances not only demonstrate the existence of a prearranged plan, but that there was a meeting of the minds of all three accused abovementioned and all three accused had acted in concert in the execution of said plan.

Matters Raised By Defence

Identification Of Murder Weapon

[35] According to the evidence, the fatal shots were discharged from a .38 Smith and Wesson revolver three inches bearing serial number J 329704. SP1 had testified that the abovementioned gun (P27C) together with 30 bullets had been handed to the first accused on 13 January 2006. This was confirmed by SP27 and particulars in the registration book.

[36] SP13 gave evidence that he had received an application to test the serviceability of P27C from SP35 on 28 February 2006. He tested P27C for serviceability and the result was positive. He identified P27C by serial No. J 329704.

[37] SP18, a chemist testified that pursuant to a request by SP35, he had conducted an examination to determine whether bullets found at the crime scene and the deceased's head were discharged from the alleged murder weapon. He confirmed that they were discharged from the said gun.

[38] The defence raised issues regarding uncertainty of the alleged murder weapon in the following respects;

1. The reference to revolver or pistol;

2. The reference to two sets of serial numbers in relevant documentation ie, J329704 and J3299704 (on envelope marked 'E 17' it was referred to as J3299704). SP27 had referred to P27C as bearing serial No. J3299704)

[39] I do not find such discrepancies material in the light of sufficient and cogent independent evidence of the identity of the murder weapon. According to evidence adduced, the serial numbers of guns are usually six digits. Thus the reasonable inference is that the seven digit number in which nine appears twice is a typographical error.

Chemist's Testimony

[40] The defence also raised doubts in respect of SP18's (the chemist') testimony in the following respects:

1. The chemist is not a ballistic expert and therefore is not possessed of the necessary expertise to give 'expert evidence'.

2. The chemist's testimony should be rejected as in his report he did not explain how he had arrived at his conclusions.

[41] After considering submissions of parties, I had earlier made a ruling to allow the DPP's application to recall SP18 under s. 138(3) of the Evidence Act 1950, in order to explain how he had arrived at his findings. SP18 had identified the exhibits by the striathan marks on the exhibits which are unique to the particular gun. He had conducted an examination to determine whether bullets found at the crime scene and the deceased's head were discharged from the alleged murder weapon. He confirmed that they were discharged from the said gun and that, "ketepatan analisa adalah seratus peratus". I am also satisfied with SP18'S explanation that he had examined the exhibits through a microscope and noted what he saw and thus, other than photos of the striathan marks, no other photos were taken as there was no necessity to take photographs of the exhibits. On careful consideration I am satisfied the chemist has the requisite experience and expertise and accept his evidence.

[42] Thus I have no doubts in respect of the identity of the gun, and that it was the said gun from which the fatal shots were fired to the deceased.

[43] The defence has also raised the following issues which it is contended, raises doubts.

The Testimony Of SP33

[44] SP33's testimony was crucial since he was an eye witness to the alleged murder. The defence had challenged the credibility of SP33's evidence on two counts.

1. SP33's evidence lacks credibility because of discrepancies with notably the evidence of SP20;

2. SP33 was an accomplice and therefore his evidence must be corroborated.

[45] It is well established by authorities that the mere existence of discrepancies does not *ipso facto* make the testimony unreliable. A distinction must be made between material discrepancies and non material discrepancies. A judge should also evaluate a witness's testimony in totality and determine which part of the testimony is unreliable and which can be accepted. (*Pie Chin v. PP* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703, *Mohamed Alias v. PP* [1981] 1 LNS 200).

[46] I have carefully reviewed SP33's testimony in its entirety and am satisfied that while there are discrepancies with parts of the testimony of SP33, such discrepancies are non material. Among the discrepancies raised by the defence are the following:

1. SP33 had described the position of the deceased before he was fatally shot as 'mencangkung' (squat) but later demonstrated and referred to the position as 'melutut' (kneel).

2. SP33 testified he had removed the talisman from the deceased and gave it to SP20 while SP 20's testimony was that he had received the deceased's talisman from the second accused.

3. SP33's testimony was that SP20 had sold the deceased's handphone to SP33 for RM100 while SP20 had stated it was SP33 who had asked SP20 to sell him the deceased's handphone.

4. SP33 had denied inflicting serious injuries to the deceased in the meeting room, but had admitted to the same when he was charged under s. 323 of the Penal code.

[47] In my opinion the abovementioned discrepancies as well as other discrepancies referred to by the defence are non material, and do not affect the credibility of SP33's evidence which in material respects was consistent and corroborative of other evidence.

Was SP33 An Accomplice?

[48] The next issue is whether SP33 is an accomplice and therefore whether his testimony requires corroboration or should be treated with caution.

[49] In the case of *Azlan Alias v. PP* [2009] 1 LNS 534 the Court of Appeal considered in what circumstances a person can be considered an 'accomplice'. A

> An accomplice being *particeps criminis* is one who participates or is associated with another person as a partner in the commission of a crime. A crime involves two essential elements *viz actus reus* which is the wrongful act, and *mens rea* which is the guilty mind. This is reflected in the maxim *"actus non facit reum nisi mens sit rea"* (the act and the mind must concur to constitute the crime). An act does not make a person guilty unless his mind be guilty. This principle, which applies to the commission of an offence as a principal offender, applies with equal force to an accomplice. B C

[50] On careful consideration of the evidence adduced, I do not find SP33 to be an accomplice. His presence at the police station as well as his role in driving the second and third accused together with the deceased to Ladang Caledonia was on the instructions of one or more of the accused. In his testimony he had said, "saya ikut arahan pihak polis-saya orang biasa". There was no evidence that he was privy to their plan. In his testimony he was instructed to drive with the second/third accused giving him directions. He was not informed of the destination or purpose of the trip and had no vested interests to cause the death of the deceased who was also one of his former employees. Without any knowledge of a prearranged plan by the first, second and third accused to murder the deceased, there can be no *mens rea* as an accomplice attributed to SP33. D E F

[51] In any event the testimony of SP33 in material respects was corroborated by other evidence. The following are a few illustrations: G

1. SP 11 who was on duty at the enquiry counter of the police station on 13 January 2006 had testified that the second and third accused were on duty on that day and was at the police station at around 6pm. They left the station and returned to the station at about 7.45pm with the first accused and the deceased. SP20 and SP33 arrived a few minutes later. SP11 saw the person identified as the deceased brought into the meeting room. She also saw the first, second and third accused frequently enter and leave the meeting room. H

2. There was forensic evidence by SP32 of the bloodstains of the deceased on the wall, the notice board and the carpet of the meeting room at the police station in Sg Pelong. I

3. Forensic evidence by SP32 also found blood stains belonging to the deceased on the cushion of the back seat, the safety belt and floor carpet of SP33's car which corroborates SP33's evidence that he was instructed by the second/third accused to drive them and the deceased to Ladang Caledonia.

4. SP19 and SP27 had confirmed that the murder weapon-A.38 Smith and Wesson revolver serial No. J329704 was in the possession of the first accused on 13 January 2006.

5. SP11 had confirmed that SP20 and SP33 had come to the police station on the night of 13 January 2006 and had gone into the meeting room and was there for almost an hour.

6. SP34 had witnessed SP33, SP20, the second and third accused at Restoran Maju Aman at around 11pm on 13 January 2006, just two hours after the deceased was driven from the police station to Ladang Caledonia.

[52] In cross-examination the defence repeatedly suggested to SP33 that the intention of the second and third accused when they left the police station was to seek medical treatment for the deceased. This suggestion was vigorously and repeatedly denied by SP33. I also found no shred of evidence that any attempt was made by the second and third accused to stop at any other place before Ladang Caledonia. Besides, in evidence SP33 had heard the second accused suggest taking out the deceased adding, "kita sekolahkan dia" (We will teach him a lesson) followed by the first accused handing over his gun to the third accused. The expression referred to cannot by any stretch of imagination be interpreted to mean the intention of taking the deceased out of the police station, was to seek medical treatment for the deceased.

[53] In addition, I had the opportunity to observe the demeanour of SP33 in the course of rigorous cross examination by learned counsels of all three accused, and I found that in material respects he was unswerved and consistent in his response. It is true that SP33 had failed to lodge a police report of the incident. I find that in the circumstances – he had played a part in injuring the deceased, and considering the alleged perpetrators to be policemen, his reluctance to lodge a police report, though not to be excused, is understandable and not a reason to doubt his credibility.

[54] In the light of a maximum evaluation of the totality of evidence adduced I was satisfied the prosecution had proven a *prima facie* case for the offence charged in respect of the first, second and third accused. I therefore ordered all three accused to enter their defence.

Evaluation Of Defence

[55] At the defence all three accused elected to give sworn statements from the dock. No witnesses were called by any of the three accused.

[56] At the defence stage, it was not disputed that the murder weapon was the gun that was registered in the first accused's name and had been handed by the first accused to the third accused prior to leaving the police station at Sg Pelong. The third accused had also admitted firing the three shots that were fatal to the deceased, but alleged that the shots were fired in self defence.

[57] The pivotal issue arising out of the defences raised by all three accused can be summarized as follows: Did the third accused act in self defence or was there a common intention to murder the deceased by the first, second and third accused? I will address the issue of self defence first, as – if self-defence is proven, it would negative the existence of a common intention by all three accused to murder the deceased. If however, the defence of self defence is not established, this court would consider if there was a common intention by the three accused to murder the deceased and whether they had acted in furtherance of that common intention.

Self Defence

The Third Accused

[58] The third accused admitted having fired all three shots but claimed to have acted in self defence.

[59] According to s. 96 of the Penal Code, 'Nothing is an offence which is done in the exercise of the right of private defence'. This right is limited by the provisions set out in s. 99 of the Penal Code. In order to establish this defence, the evidential burden is on the third accused to prove that in the circumstances of this case the third accused had a reasonable apprehension of death or grievous hurt at the hands of the deceased, and that the

A third accused had proven, on a balance of probabilities that he had acted in the exercise of his right of private defence. As was laid down in authorities like *PP v. Ngoi Ming Sean* [1981] CLJ 93; [1981] CLJ (Rep) 251; *PP v. Dato' Balwant Singh (No. 2)* [2003] 7 CLJ 285 the right of private defence commences as soon as
B there is reasonable apprehension of danger to the body and this right continues so long as such apprehension of danger continues. This right of private defence ceases when there is no more apprehension of danger to the body. In addition this right is subject to the limitation that any retaliation must not exceed what
C is reasonably necessary to avert the assailant's attack.

[60] According to the third accused, he had requested for the first accused's gun for safety reasons as the deceased though injured, was well built and aggressive. On the way to the
D deceased's 'kongsi' to retrieve his papers, the deceased wanted to relieve himself, so the third accused together with the second accused, SP33 and the deceased stopped and alighted at Ladang Caledonia.

E **[61]** The third accused and the deceased then walked some distance – about 25 feet from the parked car. While the third accused was unlocking the handcuffs on the deceased's left wrist, the deceased suddenly turned around, and gripped the third accused, trying to wrest the gun from the third accused's
F waistband. The deceased shouted he was going to kill the third accused. The deceased grabbed the gun from the third accused's waistband and the third accused heard the gun 'cork'. It was dark and the third accused could not see the deceased but heard footsteps which he presumed to be the deceased's. Fearful for his
G own life, the third accused tried to wrest the gun from the deceased and a struggle ensued in which the first shot was fired. The third accused managed to secure the gun and fell to the ground, spontaneously firing two more shots in the dark. Everything had happened so fast. The third accused had no
H intention to kill the deceased and had fired the three shots in self defence.

[62] I find the third accused's defence implausible for the following reasons.

I

[63] Much had been made by the third accused of the need to 'borrow' the first accused's gun for safety reasons as the deceased was well built and aggressive – yet the third accused had ventured 25ft away from the others, was alone with the deceased in pitch darkness and had even unlocked the deceased's handcuffs.

[64] I also find the third accused's story that it was so dark he could not see the accused and had fired wild shots out of fear and in self defence highly improbable. SP33 who was present at the material time when asked specifically about the lighting had replied thus (at p. 315):

> "kawasan itu cahaya?" "Belum gelap sangat ... sebab kawasan itu masih open-tak masuk dalam".

This was reiterated at cross examination:

> Soalan: Tempat itu gelap? Jawab: Terang juga-malam tetapi kawasan terang. Soalan: Tak ada tiang lampu? Jawab: Waktu bulan terang. Tak perasan.

[65] This is further confirmed by ExP6 (A & B) which are photos showing the site where the deceased's body was found ie, on what appeared to be a wide dirt track/clearing with bushes at the side.

[66] I also find insufficient evidence to support the third accused's contention that he had shot the deceased in self defence. If the third accused's story were true, why was it that even after the first shot had been fired and hit the deceased's head, was there a need to fire a second or a third shot – unless it was to ensure the death of the deceased. Firing three shots to the deceased's head is more consistent with a deliberate intention to kill rather than wild, spontaneous shots in self defence. In any event the deceased was not only unarmed but was also severely injured as a consequence of being kicked and punched by SP20 and SP33 at the meeting room of the police station, and therefore the threat or danger to the third accused is negligible, if at all. In the circumstances the third accused did not have a reasonable apprehension of death or grievous hurt at the hands of the deceased to warrant the third accused firing the three fatal shots.

[67] According to SP33, who was present at the crime scene at the material time, the deceased who was handcuffed was ordered to kneel on the ground near where the car was parked. SP33 testified he then saw the third accused take out his gun and from behind, shoot the deceased in the head at close range. SP33 heard the deceased cry out and fall to the ground. The third accused shot the deceased a further two times in the head from behind. The third accused then relieved the deceased of his handcuffs.

[68] The above is consistent with the findings of SP30 as well as SP21. According to the evidence of SP30 who conducted the autopsy on the deceased, the three bullets which were lodged in the deceased's head were probably shot at close range "jarak 6-10 kaki di antara simati dan penembak" and that the shots were fired from behind. This testimony is further corroborated by SP21, (at p. 88) who had conducted an investigation at the site and made a finding that, "kesan lebam pada pergelangan simati – saya percaya simati diikat" and further (at p. 90) "simati ditembak dari jarak yang dekat dalam keadaan duduk". SP33's evidence that the deceased was handcuffed at the time and only relieved of his handcuffs after the act was perpetrated leads to the irresistible inference that the deceased was held captive to facilitate the commission of the act.

[69] Last but not least the third accused allegation of the struggle for the gun and firing the three shots in self defence only surfaced at the defence stage.

[70] I therefore reject the third accused's defence that he had fired the three shots that were fatal to the deceased in self defence. From the evidence adduced I am of the opinion that the third accused had fired the three shots to the deceased's head with the intention to kill the deceased.

Common Intention

[71] The next question to be determined is whether there was a common intention by the first, second and third accused, acting in concert to murder the deceased?

Defence Of First Accused

[72] The defence raised by the first accused is premised on the absence of a common intention by the first accused to commit murder. The following matters were raised by the first accused in his defence.

[73] The first accused was not a participant in any common intention to commit murder of the deceased as the first accused had been observed in the lounge area of the police station watching television while the deceased was in the station's meeting room with the second and third accused.

[74] The first accused, after bringing the deceased in for questioning had borrowed SP11's motorbike and gone home for a shower and only returned to the station later, after which he watched television.

[75] The first accused had surrendered his gun to the third accused on the third accused's request and for the purpose of safety of the second, third accused and SP33, in escorting the deceased who was well built and known to be aggressive. The first accused had not at anytime offered them his gun.

[76] The first accused was not personally acquainted with SP20 and had no personal interest in the marital affairs of SP20's wife with the deceased.

[77] The accused was not present at the scene of the crime. The first accused had declined to accompany the group as he wanted to return home as his wife was expecting.

[78] The first accused was unaware that his gun had been used as the second accused had substituted the three spent bullets with fresh bullets from the armoury. Neither the second nor the third accused had informed the first accused of what happened at Ladang Caledonia.

[79] From the evidence, the first accused together with the second and third accused had gone to the deceased's workshop and brought the deceased back to the police station. SP11, who was on duty at the enquiry counter at the station also testified the first accused was seen going in and out of the meeting room where the deceased was being held. I do not believe the first accused's story that after bringing the deceased to the station, he

had borrowed SP11's motorbike and returned home, and only returned to the station later. SP11 when asked had repeatedly denied that the first accused had borrowed her motorbike to return home and only came back to the station later. There is also a discrepancy in the first accused's own evidence when he said (at p. 584) that after the second and third accused had left the station with SPP33 and the deceased,

> Saya balik rumah baliklah hendak tengok isteri saya pula. Rumah saya tak jauh berhadapan dengan balai jadi saya naik kereta saya pergi ke rumah.

[80] The most 'damning' evidence against the first accused is that it was the first accused's gun which was the murder weapon and the accused himself had handed it to the third accused. SP33 had testified that before leaving the station with the deceased, the second accused had said in the presence of the first accused, "kita sekolahkan dia" (we will teach him a lesson), 'dia' – referring to the deceased.

[81] However, on careful consideration of the totality of evidence as well as the above defence, I am of the opinion that there are reasonable doubts as to whether the third accused had a common intention to murder the deceased. There is evidence from SP33 that for part of the time while the deceased was being questioned in the meeting room, the first accused was in the lounge of the station watching television.

[82] SP33 had testified that it was the second and third accused who had brought the deceased out of the meeting room and subsequently driven out of the station in SP33's car. The second and third accused had met the first accused at the lounge watching television. The first accused had also declined to accompany the second and third accused as his wife was expecting and he remained behind at the station.

[83] There is no evidence that it was the first accused who had offered his gun to the third accused. This was corroborated by the third accused himself in his testimony where he had admitted requesting the gun from the first accused. The first accused had complied with the third accused's request, as being the most junior of all three accused, felt obliged to do so. This was evident in his testimony: (p. 593)

... Saya pun dah lama bekerja di bawah dia orang dulu. Kira anak buah dia oranglah atau pun incharge saya. Bukan saya nak bagi pistol itu untuk bunuh orang itulah. Tujuan untuk escort.

[84] The purpose of borrowing the gun was expressed by the second accused as, "kita sekolahkan dia", which roughly translated means "we will teach him a lesson", which in general terms cannot be synonymous with an intention to kill the deceased. Could an inference be made that the first accused by the mere act of lending his gun to the third accused possess the common intention to use the gun to murder the deceased? From the circumstances, I have reasonable doubts that the first accused possessed such an intention. The first accused had also testified he only knew of the deceased's death on the day he was arrested.

[85] Last but not least is the evidence of the third accused that the second and third accused had gone to great lengths to keep the first accused from knowing his gun had been used to kill the deceased by substituting the spent bullets with fresh bullets from the armoury. Had the first accused been *'ad idem'* with the second and third accused, there would have been no necessity to hide the fact that the first accused's gun had been used as the murder weapon. The gun remained with the first accused until he was arrested and his gun confiscated on 22 January 2006, about nine days after the murder of the deceased. Had he known it was used to murder the deceased, it is highly unlikely that he would still have continued to retain the murder weapon.

[86] Thus on careful consideration of the totality of evidence adduced, including the defence raised by the first accused, I am of the opinion that even if there were sufficient evidence that the second and third accused were acting in concert to murder the deceased, there are reasonable doubts that the first accused had a common intention with the second and third accused to murder the deceased.

[87] I therefore ordered the first accused Sahari bin Usul, to be acquitted and discharged.

Defence Of Second And Third Accused

[88] What remains to be considered is whether the second and the third accused had the common intention to murder the deceased and had acted in furtherance of that common intention?

[89] Among the matters raised in defence by the second and third accused were:

(i) The second and third accused had taken the deceased out of the station in order to seek medical treatment for the deceased. Since the deceased did not have his papers with him, the second and third accused together with SP33 had set out to go to the deceased's 'kongsi' located near Ladang Caledonia for the purpose of retrieving the deceased's papers. On the way to the deceased's 'kongsi', the deceased wanted to relieve himself so they stopped the car and alighted at Ladang Caledonia.

(ii) The third accused then brought the deceased to relieve himself at a distance of about 20-30 metres from the parked car. When the fatal shots were fired, the third accused was 22-25 feet away attending to a call from the station. The second accused did not witness the shooting, and only heard the gunshots. The second accused ran towards the third accused and saw the deceased sprawled on the ground. The third accused told the second accused that the gun had accidently been fired when the deceased was struggling with the third accused.

(iii) The third accused denied having said, 'kita sekolahkan dia' before taking the deceased out to Ladang Caledonia, or that he had said, 'dah padam dah' to SP20 as he showed the spent bullets to SP20 at Maju Aman Restaurant after the incident at Ladang Caledonia. The second accused also denied having any common intention with the third accused to murder the deceased.

[90] After careful evaluation of the evidence in totality, including the defences raised by the second and third accused, I find numerous circumstances that converge to an irresistible inference that the second and third accused shared a common intention to kill the deceased and had acted in concert in furtherance of such common intention. I am also of the opinion that the defence of the second and third accused had failed to cast reasonable doubts on the prosecution case.

[91] I find the story that the second and third accused had intended to bring the deceased for medical treatment and had gone to the Ladang Caledonia to get the deceased's papers from

his home implausible. The deceased's brother SP26 and SP2 testified that the deceased lived in a room behind a 'bengkel' (workshop) (exh. P8 (A & B) which was five minutes away from the police station. In addition, the evidence of the first accused himself was that earlier on the same day all three accused had gone to the 'bengkel' to look for the deceased. The first accused found the deceased with a few Achinese in a small room behind the bengkel, (p. 579),

> kawasan itu bilik kecil macam ini ada dua tiga empat orang duduk mungkin bangsa Acheh semua. Kami tanya siapa yang bernama Yusrizal jadi seorang itu bangun angkat tangan. Saya tengok dia pakai kain pelekat sahaja ... jadi kami kata pakai baju pakai seluar ikut kami pergi ke balai ... jadi dia pun pakai baju semua ...

[92] Would the deceased be in a 'kain pelekat' and be able to change his clothes if it was not where he lived?

[93] Thus I believe that all three accused knew where the deceased lived as they had picked him up from his home barely three hours before. If the deceased's papers were needed for medical treatment, it is likely to be found where the deceased was living just five minutes away. Why drive the deceased to a *kongsi* in Ladang Caledonia located at least 30 minutes away? There is not a shred of evidence that the kongsi near Ladang Caledonia was where the deceased lived. Thus I find the reason given for taking the accused to a kongsi in Ladang Caledonia in order to get his papers, inherently incredible.

[94] The deceased had been picked up by the first, second and third accused with the second accused driving his vehicle. At the material time, between the three accused, it was the second accused who was the most senior and a supervisor at the station. The second accused had admitted that he knew the deceased was not in the police wanted list. Neither had a police report been lodged at Sg Pelong of the deceased's threat to SP20, yet the second accused had allowed civilians (SP20 and SP33) to beat up the deceased in the meeting room of the police station! According to SP20, on arrival at the police station, the second accused had informed SP20, "masuk dan lepaskan geram, tapi jangan sampai teruk". I do not believe the second and third accused's story that SP33 and SP20 had suddenly burst into the meeting room and kicked and punched the deceased and the second and third accused, both police officers, were unable to prevent the deceased from being severely beaten up.

[95] The evidence by SP32, a forensic analyst was that blood stains of the deceased were found on the wall, the notice board and the carpet in the meeting room of the police station and even on the seat, seat belt and floor mat of SP33's car. The injuries suffered by the deceased were serious enough which meant that the beatings/punching had been allowed to continue for some time.

[96] In addition, according to SP33, on leaving the meeting room, he heard the second accused say they were going to bring the deceased out and added, "Kita sekolahkan dia" (We will teach him a lesson). At no point was any mention made by the second and the third accused that they were bringing the deceased to a clinic or hospital.

[97] The deceased was handcuffed, badly beaten and had even been relieved of his talisman which were believed to give the deceased special powers. The deceased was accompanied by two police officers and a civilian – why was a gun needed for security reasons? It was the third accused who had requested the first accused to lend them his gun, which the first accused obliged.

[98] The second accused claimed they had stopped at Ladang Caledonia as the deceased was desperate to relieve himself – yet the *'kongsi'* where it was alleged the deceased stayed was barely 200yds away. From the photos of the site where the deceased's body was found as well as the evidence of SP6 (p. 48) as well as exh. P114, "jauh mayat dari simpang 30 meter". It appears that the deceased had been led quite a distance from the junction to the main road just to relieve himself!

[99] SP33's testimony was that he had stopped the car on the third accused's instructions, and the second and third accused had got out of the car leaving SP33 with the deceased inside the car. According to SP33 he heard the second and third accused in discussion but he could not make out what was said. SP33 was then instructed to take the deceased out of the car. The deceased was then made to kneel on the ground. SP33's evidence was that when the third accused fired three shots into the deceased's head from behind, the second accused was in front of the deceased and had witnessed the act of the third accused.

[100] According to SP33, on the journey back from Ladang Caledonia, the second accused had instructed SP33 to call SP20 to ask SP20 to bring the deceased's telephone sim card and to meet them at Restoran Maju Aman. SP20 had testified:

> Kpl Alias (the second accused) tunjuk 3 butir kelongsong peluru kosong. Dia cakap dah padamlah.

[101] The abovementioned meeting was corroborated by SP34 who testified seeing SP33, SP20, the second and third accused at the abovementioned restaurant on 13 January 2006 at about 10-11pm.

[102] If it was true that the deceased's death was non intentional, why did the second and third accused, instead of reporting the incident, try to cover their deed by replacing the spent bullets from the first accused's gun before returning the gun to the first accused.

[103] It is also suspicious why when the second accused possessed his own vehicle (the vehicle that was used to arrest the deceased), he had preferred to use SP33's car giving the reason that there were no vehicles at the station. Even the third accused had requested the first accused to lend them his gun, although it is a well established procedure that each police personnel was obliged to keep his own gun and not lend it to others. The third accused had also admitted that there was no necessity for him to borrow the first accused's gun as there were guns available at the Sg Pelong station. His reason for borrowing the first accused's gun – that they were in a hurry to leave to seek medical treatment for the deceased and the thought had not crossed his mind, appear hollow and unconvincing.

[104] Noteworthy too is that the first accused was not on duty at Sg Pelong station but in Subang where presumably his gun would be registered. The attempts by the second and third accused to – as it appears, 'cover their tracks' is more consistent with a deliberate pre-planned concert to murder the deceased rather than a shooting in self defence.

[105] The synchronized, mutually supporting roles played by the second and third accused, from the time the deceased was brought into the station, to the time the fatal shots were fired, leads this court to the irresistible inference that the shooting of the deceased was not done in self defence but the execution of a deliberate plan by the second and third accused.

[106] From arresting the deceased without proper evidence and procedure, to detaining the deceased and encouraging civilians to injure the deceased on the premises of the police station in their presence, to bringing the deceased to Ladang Caledonia to execute their plan, and immediately afterwards to meet up with a civilian, SP20 to report the deed had been done, and thereafter to actively conceal the evidence of their deed, willfully disregarding proper police procedures – the second and third accused were not acting in accordance with their duty as police officers, but on the contrary had acted as 'partners' in the heinous crime committed.

[107] As to when they reached a consensus *'ad idem'* it could have been anytime between the arrest of the deceased to the fatal shots fired by the third accused. The conduct of both the second and third accused throughout is totally consistent with such consensus.

[108] Thus, after careful consideration of the totality of evidence adduced, including the defence of the second and third accused, I was of the opinion that there is ample cogent and credible evidence to demonstrate that the second and third accused had the common intention and was acting in concert to commit murder of the deceased. The defence offered by the second and third accused had failed to rebut or to raise reasonable doubts on the prosecution's case.

[109] I therefore found the second and third accused guilty of a common intention and acting in concert in furtherance of their common intention to murder the deceased in accordance with s. 302 and 34 of the Penal Code. I accordingly, convicted the second and third accused of the offence as charged. I passed the only sentence provided under s. 302 of the Penal Code ie, the death penalty on the second and third accused.